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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
GTE Telephone Operating Companies)	Transmittal Nos. 873, 874, 893
)	
Revisions to Tariff F.C.C. No. 1)	CC Docket No. 94-81

APPLICATION FOR REVIEW

GTE Service Corporation (Service Corp.), on behalf of GTE California Incorporated, formerly General Telephone Company of California (GTECA), pursuant to Section 1.115 of the Commission's Rules,¹ respectfully requests review of an Order of the Common Carrier Bureau (Bureau) adopted and released July 14, 1994, DA 94-784 (July 14, 1994 Order). As set forth below, rejection of GTOC Tariff Transmittal No. 874 by the Bureau in its July 14, 1994 Order is invalid and must be reversed.

I. STATEMENT OF INTEREST.

GTECA is a common carrier which, in accordance with Transmittal No. 874, seeks to provide video channel service to Service Corp. in Cerritos, California. Tariff Transmittal No. 874 was necessitated by the July 17, 1994 expiration of the "good cause" waiver granted by the Commission in 1989. *In re General Telephone Co. of California*, 4 FCC 5693 (1989) (*Cerritos Order*). This waiver permitted GTECA to provide video signal transport to Service Corp. on the basis of a private contract for a

¹ 47 C.F.R. § 1.115.

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period of five years. With the expiration of the waiver, GTECA is required to convert its video transport agreement with Service Corp. from a private contractual arrangement to a tariffed common carrier service in compliance with the Communications Act and the Commissions Rules. *See, e.g., 47 U.S.C. § 203; In the Matter of Commission Order Dated April 6, 1966 Requiring Common Carriers to File Tariffs with Commission for Local Distribution Channels Furnished for Use in CATV Systems, 4 FCC 2d 257 (1966); In re General Telephone Co. of California, 13 FCC 2d 448 (1968).*

The Bureau's July 14, 1994 Order rejected Transmittal No. 874 under which GTECA would provide video channel service to Service Corp. after July 17, 1994. GTECA and Service Corp. have previously participated in this proceeding. Both GTECA and Service Corp. are aggrieved by the July 14, 1994 Order. 47 C.F.R. § 1.115(a).

II. THE REJECTION OF GTOC TARIFF TRANSMITTAL NO. 874 BY THE BUREAU IS CONSTITUTIONALLY INVALID AND MUST BE REVERSED.

A. The July 14, 1994 Order.

The Bureau rejected Transmittal No. 874 specifically and exclusively on the basis of the video programming ban. *See 47 U.S.C. § 533(b); 47 C.F.R. § 63.54.* In the July 14, 1994 Order, the Bureau passed upon the constitutionality of the video programming ban. 47 C.F.R. § 1.115(c). The Bureau stated:

"Transmittal 874 by its terms expressly provides transmission service to an affiliate of GTECA for the delivery of video programming. ... The involvement of Service Corp., an affiliate of GTECA, with the provision of video programming violates Sections 63.54 and 63.55 of the Commission's Rules, 47 C.F.R. § 63.54, 63.55, and Section [613(b)] of the Communications Act, 47 U.S.C. § [533(b)]. As previously indicated, after July 17, 1994, GTECA's waiver of Sections 63.54 and 63.55 of the

Commission's Rules will expire by its terms. We therefore conclude that Transmittal 874 is patently unlawful on its face and must be rejected."

July 14, 1994 Order, *slip op.*, at 6-7 (¶ 16).² The Bureau rejected GTECA's reliance on *Chesapeake & Potomac Telephone Co. v. United States*, 830 F.Supp. 909 (E.D. Va. 1993), *appeal pending sub. nom. Bell Atlantic v. United States*, No. 93-2340 (4th Cir.) (C&P), for the proposition that the statutory video programming ban and the Commission's implementing regulations are unconstitutional. The Bureau stated:

"The Commission found in the Remand Order [8 FCC Rcd 8178 (1993)], however, that the C&P case did not limit the Commission's ability to rescind the waiver in this case. Moreover, the Commission has previously stated that the cross-ownership rule is consistent with the First Amendment to the Constitution."

July 14, 1994 Order, *slip op.*, at 7 (¶ 17).

B. The Question Presented.

GTECA and Service Corp. challenge the Bureau's rejection of Transmittal No. 874. 47 C.F.R. § 1.115(b)(1).³ The Bureau's rejection of Transmittal No. 874 must be reversed. 47 C.F.R. § 1.115(b)(3).

The video programming ban, which is the Bureau's specific and exclusive basis for rejection of Transmittal No. 874, is unconstitutional. *See, e.g., GTE California*

² In fact, Transmittal No. 874 makes no mention of the type of video content which Service Corp. might transmit to its subscribers. *See* GTE Consolidated Reply to Petitions to Reject or Suspend Tariffs, June 1, 1994, at 3, n. 5.

³ While GTECA does not seek review of any other portion of the July 14, 1994 Order at this time, GTECA does not concede that the Commission, rather than United States District Court for the Central District of California, has jurisdiction to determine certain legal issues set forth for consideration in the investigation. *See, generally, United Telephone Co. of the Carolinas, Inc. v. Federal Communications Commission*, 559 F.2d 720 (D.C. Cir. 1977).

Incorporated v. Federal Communications Commission, No. 93-70924 (9th Cir.), Petitioner's Brief, February 14, 1994, and Petitioner's Reply Brief, April 22, 1994; C&P, 830 F.Supp. at 932; *U S West, Inc. v. United States*, No. C 93-1523 R, Order Granting Plaintiffs' Motion for Summary Judgment (W.D. Wash. June 15, 1994); *BellSouth Corp. v. Federal Communications Commission*, No. CV 93-B-2661-S, Order Pending (N.D. Ala.).

Because the Bureau's rejection of Transmittal No. 874 is based upon a constitutionally impermissible statute and invalid implementing regulations, the action taken by the Bureau pursuant to delegated authority is in conflict with the Constitution of the United States and must be overturned. 47 C.F.R. § 1.115(b)(2)(i), (b)(2)(iii).

C. Relief Requested.

GTECA and Service Corp. respectfully request that the Bureau's rejection of Transmittal No. 874 in the July 14, 1994 Order be overturned and that the tariff submitted in Transmittal No. 874 for GTECA's provision of video channel service to Service Corp. in Cerritos, California be permitted to take effect. 47 C.F.R. § 1.115(b)(4).

III. CONCLUSION.

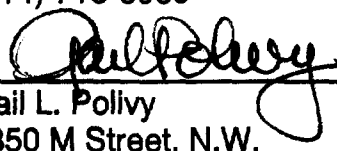
For the reasons stated herein, the Commission should review the Bureau's July 14, 1994 Order, reverse that portion of the July 14, 1994 Order which rejects Transmittal No. 874 and permit the tariff submitted in Transmittal No. 874 for GTECA's provision of video channel service to Service Corp. in Cerritos, California to take effect.

Respectfully submitted,

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Application for Review" have been mailed by first class United States mail, postage prepaid, on the 26th day of July, 1994 to all parties on the attached list.


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